BEFORE THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

Petition of Verizon South Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in South Carolina Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	Docket No. 2004-0049-C

VERIZON SOUTH INC.'S
OPPOSITION TO MOTIONS TO DISMISS

Verizon South Inc. ("Verizon") submits this opposition to: (1) the motion to dismiss filed by ICG Telecom Group Inc. ("ICG"); and (2) the motion to dismiss or strike filed by AT&T Communications of the Southern States, LLC ("AT&T").

I. INTRODUCTION

The foregoing motions to dismiss do not present any valid reason for delaying or dismissing any aspect of this proceeding.

First, ICG argues that Verizon's petition is premature because the Bell Atlantic/GTE merger conditions require Verizon to provide UNEs until the *Triennial Review Order* ("*TRO*") is final and non-appealable.[1] But the merger conditions were effective for only three years, which means they terminated no later than July 2003. Moreover, by their express terms, the specific condition on which ICG relies applies only to two earlier FCC orders, not to the *TRO*. As the Rhode Island arbitrator recently held, these merger conditions expired of their own accord, and have no effect here.

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded*, *United States Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

Second, ICG argues that Verizon failed to comply with the procedural and formal requirements of § 252(b). However, Verizon filed its petition within the window established in the *TRO*, which is derived from the timetable established for interconnection agreement negotiation and arbitration under § 252(b). Moreover, Verizon's petition conforms to all applicable formal requirements of § 252(b). In any event, the Commission should reject an invitation to apply the provisions of § 252(b) and its procedural rules in an overly rigid manner, in light of the unique circumstances of this case.

Third, ICG argues that the Commission should not consider Verizon's petition while the state of the law is unsettled. But the *TRO* was upheld in numerous respects, particularly insofar as it reduced prior federal unbundling requirements. Moreover, Verizon's draft TRO Amendment contains provisions designed to address the possibility of future legal developments with respect to the *TRO*.

Fourth, ICG argues that the Commission should dismiss Verizon's petition to the extent it concerns routine network modifications because this issue is not a product of a change of law. But, the FCC plainly stated that its network modification rule in the *TRO* was newly adopted, and never asserted that its prior rules required incumbents to perform routine network modifications.

Fifth, AT&T supports going forward with this arbitration, but argues that the Commission should dismiss or strike Verizon's Update to its Petition to recognize the

D.C. Circuit's *USTA II* decision.[2] AT&T fails to understand that Verizon's updated Amendment will accommodate potential legal developments, including the possibilities that *USTA II* will be stayed or reversed. In addition, AT&T fails to understand that this proceeding is intended to address the unbundling obligations of the *TRO*, not some other order or ruling. Verizon's update does not change that fact, so AT&T's argument about the contractual change-of-law process relative to *USTA II* is inapposite.

For these reasons, and as set forth in greater detail below, the motions to dismiss should be denied.[3]

II. THE BELL ATLANTIC/GTE MERGER DOES NOT PREVENT IMPLEMENTATION OF THE *TRIENNIAL REVIEW ORDER*

ICG argues that Verizon's petition is premature because the Bell Atlantic/GTE merger conditions[4] require Verizon to provide UNEs until the *TRO* is final and non-appealable. ICG Motion at 4-7. ICG is wrong. Under the plain terms of the *BA/GTE Merger Order*, Verizon's obligation to provide UNEs in accordance with the terms of the

[2] MCImetro Access Transmission Services, Inc., MCI WOLRDCOM Communications, Inc. and Intermedia Communications, Inc. (collectively, MCI) did not file a motion to dismiss. However, in its response to Verizon's arbitration petition, MCI also opposes Verizon's March 19, 2004 update on the ground that *USTA II* has not effected a "change of law" within the meaning of the parties' interconnection agreements. *See* MCI's Response at 2-3. Like AT&T's arguments, this argument should be rejected for the reasons set forth herein.

[3] US LEC of South Carolina Inc. (US LEC) did not file a motion to dismiss. However, in its response to Verizon's arbitration petition, US LEC requests that the Commission "conduct an individual arbitration to resolve the issues in dispute between Verizon and US LEC." US LEC Response at 2. The Commission should deny US LEC's request for an individual arbitration because many of US LEC's issues are common to other CLECs, and it would be a waste of the Commission and Verizon's resources to litigate the same issues multiple times with individual CLECs. In addition, US LEC's allegation that Verizon has "walked away from the [negotiations] table" is incorrect, as US LEC's own chronology proves. US LEC admits that the parties are still engaged in negotiations. US LEC Response at 4–5.

[4] *See* Memorandum Opinion and Order, *GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032 (2000) ("*BA/GTE Merger Order*").

UNE Remand Order[5] and *Line Sharing Order*[6] was limited in two ways. First, that obligation expired as soon as there was "a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by [Verizon] in the relevant geographic area." *BA/GTE Merger Order*, 15 FCC Rcd at 14316, App. D ¶ 39. Second, all of the merger conditions expired "36 months after the Merger Closing Date" except "where other termination dates are *specifically established* herein." *Id*., at 14331, App. D ¶ 64 (emphasis added). Any obligations to provide UNEs in accordance with the terms of the *UNE Remand Order* and *Line Sharing Order* have expired under both of these provisions.

A. The Merger Conditions Have Expired Because the D.C. Circuit's Decision in *USTA I* Is Final and Non-Appealable

ICG claims that the merger conditions have not expired because, in its view, the *TRO* is a subsequent proceeding and, therefore, that because the *TRO* is not yet "final and non-appealable," Verizon still must provide CLECs with access to the UNEs required in the vacated *UNE Remand Order* and *Line Sharing Order*. In essence, ICG argues that Verizon agreed to provide UNEs in accordance with the requirements of the *UNE Remand Order* and the *Line Sharing Order* not only until the requirements of those orders were set aside by a final, non-appealable judicial order, but also until the

[5] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *petitions for review granted*, *United States Telecomm. Ass'n v. FCC*, 290 F. 3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

[6] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated and remanded*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1571 (2003).

conclusion of any appeals of any subsequent proceeding that might occur *after* those orders were vacated.

ICG's argument ignores the clear terms of the *Bell Atlantic/GTE Merger Order* and the FCC's holding in the *TRO*. Paragraph 316 of the merger order states that the obligation to provide those UNEs lasts only "until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory." *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd at 14180, ¶ 316. Similarly, the merger condition itself states clearly that "[t]he provisions of this Paragraph shall become null and void and impose no further obligation on Bell Atlantic/GTE after the effective date of final and non-appealable [FCC] orders in the UNE Remand and Line Sharing proceedings, respectively." *Id.* at 14316, App. D, ¶ 39. Both the *UNE Remand Order* and *Line Sharing Order* were vacated by the D.C. Circuit in the first *USTA* decision: *United States Telecomm. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003). Because *USTA I* took effect on February 20, 2003 and *certiorari* was denied on March 24, 2003, that decision constitutes a final and non-appealable judicial decision that the prior UNE rules had no force and effect. At that point, as the FCC itself has held, "the legal obligation [to provide access to UNEs and UNE combinations] upon which . . . existing interconnection agreements are based . . . no longer exist[ed]." *TRO*, 18 FCC Rcd at 17406, ¶ 705. That is, when the Supreme Court denied certiorari in *USTA I*, there was a "final and non-appealable judicial decision that determine[d] that [Verizon] [was] not required to provide" UNEs in accordance with the terms of the *UNE Remand Order* or *Line Sharing Order*.

This is precisely what the FCC's Common Carrier Bureau has already ruled in analogous circumstances. It held that, with respect to the same condition on which ICG relies, "[t]he *Merger Conditions* require Verizon's incumbent local exchange carriers . . . to comply with certain [FCC] rules 'until the date of any final and non-appealable judicial decision' concluding the litigation concerning those rules by invalidating them." Letter Clarification, *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd 18327, 18328 (2000) (footnote omitted). Thus, if the Supreme Court were to vacate the FCC's TELRIC rules, the Bell Atlantic/GTE merger conditions "would not independently impose an obligation to follow any finally invalidated pricing rules." *Id.* Likewise, here, the *UNE Remand Order* and the *Line Sharing Order* have been "finally invalidated," and the *Bell Atlantic/GTE Merger Order* imposes no independent obligation to follow those rules.[7]

Notably, in accordance with the terms of the *Bell Atlantic/GTE Merger Order*, an independent auditor has verified in its report to the Commission that the obligations imposed under paragraph 39 of the merger conditions expired on March 24, 2003.[8] One would think that if ICG really believed that their argument is valid, they would have disputed the auditor's determination before the FCC. Yet no CLEC did so.

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[7] Far from over-riding the clear limitation on Verizon's obligations, the reference to "subsequent proceedings" in paragraph 316 provides an *additional limitation* on the potential length of Verizon's obligation. Even if the D.C. Circuit had never vacated the *UNE Remand Order* and *Line Sharing Order*, the Merger Conditions make clear that where a subsequent FCC order on any subject within the scope of paragraph 39 became final, that too would put an end to the corresponding obligation under the Merger condition. The issue is academic, however, because *USTA I* was a final, non-appealable decision that put an end to any obligation under this provision.

[8] *See* Letter from Deloitte and Touche LLP to Marlene H. Dortch, FCC, CC Docket 98-184 (FCC filed Oct. 17, 2003); see also *BA/GTE Merger Order*, 15 FCC Rcd at 14328, ¶¶ 56(d) ("The independent auditor may verify [Verizon's] compliance with these Conditions through contacts with the [FCC], state commissions, or [CLECs]"); *id*., ¶ 56(e) ("The independent auditor's report shall be made publicly available.").

B. The Merger Conditions Have Expired Pursuant to the Sunset Provision

The merger condition on which ICG relies — like virtually *all* of the conditions in the *Bell Atlantic/GTE Merger Order* — expired of its own force in July 2003, 36 months after the Bell Atlantic-GTE merger closed. The merger conditions contain a sunset clause, which provides that, with limited exceptions not relevant here,[9] "*all* Conditions set out in th[e] [Order] . . . *shall cease to be effective and shall no longer bind Bell Atlantic/GTE in any respect* 36 months after the Merger Closing Date." *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd at 14331, ¶ 64 (emphases added). Because the merger closed in July 2000, virtually all of the conditions, including the one on which ICG relies, ceased to be effective no later than July 2003. The Commission should therefore conclude, like the Rhode Island Public Utilities Commission, that "the sun has set on [Verizon's] obligation to provide UNEs under the Bell Atlantic/GTE Merger Order." *Rhode Island Arbitration Order* at 19. Indeed, the arbitrator there found that, even if the merger condition at issue had not sunset, it was implicitly repealed by paragraph 705 of the *TRO*, which preempted interpretations of change-of-law provisions

[9] ICG might believe that the sunset provision is inapplicable because it does not apply "where other termination dates are *specifically established*" by the Merger Order. *BA/GTE Merger Order*, App. D, 15 FCC Rcd at 14331, ¶ 64 (emphasis added). But that exception does not apply here. Paragraph 39 does not establish a "specific" termination date. Instead, that paragraph refers to events that could (and did) bring Verizon's obligations to an end before the expiration of the 36-month period. As the arbitrator in the Rhode Island *TRO*-implementation proceeding recently held, the "specific date" exception to the sunset provision does not apply because "a specific future event is not a specific date." *See In re Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements*, Procedural Arbitration Decision, RI PUC Docket No. 3588 at 19 (Apr. 9, 2004) (Frias, Arbitrator) ("*Rhode Island Arbitration Order*").

that might delay amendment of agreements until all appeals of the *TRO* were final and non-appealable.[10]

C. The Argument Advanced by ICG Is Illogical

The argument advanced by ICG is illogical. ICG insists that even in the face of a judicial order squarely holding that a UNE obligation is unlawful, the Merger Conditions would require Verizon – and no one else – to continue to provide that UNE indefinitely, so long as the FCC continued to hold proceedings with respect to any issue addressed in the *UNE Remand Order* and *Line Sharing Order*. Moreover, ICG insists that this is true even in cases where the FCC itself has repudiated a particular obligation as harmful to consumers, so long as any proceeding or appeal arising from the FCC's efforts to adopt lawful unbundling rules remains pending. It simply cannot be correct that the Merger Conditions were intended to preserve anti-competitive provisions in earlier FCC orders that were vacated by the courts and subsequently repudiated by the FCC.

Indeed, the pro-consumer benefits of removing certain unbundling obligations are precisely why the FCC made clear that the provisions in the *TRO* must be implemented now. *See TRO*, 18 FCC Rcd at 17406, ¶ 705 (stating that it would be "unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order"). The FCC emphasized that *any* delay in implementing the *TRO* would "have an adverse impact on investment and sustainable competition in the telecommunications industry." *Id.* at 17405, ¶ 703. There is no basis for perpetuating a set of UNE obligations that were struck down in a

[10] *Rhode Island Arbitration Order* at 13.

final and non-appealable decision nearly two years ago (*USTA I*).

III. VERIZON'S PETITION COMPLIES WITH THE APPLICABLE REQUIREMENTS OF § 252(B)(2)(A)

ICG claims that Verizon failed to satisfy the elements of § 252(b)(2)(A), which requires the petitioning party to "provide the State commission all relevant documentation concerning — (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issue discussed and resolved by the parties." ICG Motion at 8–11. ICG's claim is flatly wrong.

The requirements that apply to a petition for arbitration of a *new* agreement under § 252(b)(2) do not necessarily apply to Verizon's petition to *amend* existing agreements. The FCC has held that the "section 252(b) *timetable*" and negotiation process applies,[11] but it never held that a petition seeking resolution of disputes over amendments with respect to the *TRO* would necessarily have to comply with all of the formal requirements of a petition for arbitration of a brand new agreement.

Even assuming that the technical requirements of § 252(b)(2) do apply, however, Verizon has complied with those requirements in light of the circumstances of this proceeding. Verizon has set forth the issues presented by its draft amendment and has explained its position in detail. Because Verizon has initiated a consolidated proceeding, it has not been possible to describe "the position of each of the parties" on the "unresolved issues." Verizon has generally received little in the way of response to its proposal, and because most of the responses that Verizon has received did not represent serious efforts at negotiation and arrived very late in the process (*e.g.*, about four months after Verizon made its draft amendment available to CLECs on October 2,

[11] *TRO*, 18 FCC Rcd at 17405-06, ¶¶ 703-704 (emphasis added).

2003 – which was only about 10 business days before Verizon filed its petition pursuant to the TRO-mandated arbitration window), Verizon was simply unable to set forth other parties' position on the various issues.[12] As this Commission is aware, however, each of the parties had the opportunity in its response to Verizon's petition to set forth its own position on each of the issues in its own words, and several parties have done so. Verizon has thus complied with the purpose behind § 252(b)(2), which is to set forth the disputed issues that the Commission may be called upon to resolve.

IV. THE LAW IS NOT UNCERTAIN, AND PROMPT IMPLEMENTATION OF THE *TRIENNIAL REVIEW ORDER* IS CRITICAL

ICG claims that this proceeding would waste administrative resources because the law on which the Petition purports to be based is still undetermined. ICG Motion at 11–15. ICG points to the fact that FCC Commissioners sought a stay of the D.C. Circuit's mandate in *USTA II*, that the Court has vacated portions of the *TRO*, that Verizon has filed a modified version of its *TRO* amendment, and that Verizon has requested state commissions to abate their nine-month *TRO* implementation proceedings.

[12] Indeed, it is quite audacious for ICG to argue that Verizon failed to describe ICG's position regarding Verizon's amendment given that ICG (like most CLECs) delayed for more than four months and failed to disclose its position until forced to do so by Verizon's filing of its arbitration petition. ICG did not even respond to Verizon's October 2, 2003 amendment offer until February 26, 2004, after Verizon had filed its arbitration petition here. In an email to Verizon on that date, ICG raised some questions regarding certain provisions of Verizon's amendment, which the parties later discussed on a conference call. ICG did not provide a redline of its proposed changes to Verizon's amendment until March 25, 2004 – more than a month after Verizon filed its arbitration petition. Thus, it was impossible for Verizon's arbitration petition to address ICG's position. Similarly, AT&T, after more than four months of delay, submitted its redline of Verizon's amendment just five business days prior to the date on which the TRO-mandated arbitration window opened, leaving insufficient time for Verizon to analyze AT&T's proposed changes and discuss them with AT&T in order to understand AT&T's positions.

But the D.C. Circuit's decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") provides no basis for deferring this proceeding. *USTA II* did not affect the process the FCC expected carriers to use to make appropriate changes to their interconnection agreements in response to the *TRO*. The FCC directed carriers to use the timeline established in § 252(b), and the Commission has the responsibility to resolve disputed issues presented by Verizon's petition in accordance with that timeline. *See TRO*, 18 FCC Rcd at 17405-06, ¶¶ 703-704.

Moreover, although the D.C. Circuit vacated certain portions of the *TRO*, many of the FCC's rulings (and, in fact, all or almost all of the FCC's rulings delisting UNEs) were left in place by the court's decision, either because the court upheld the relevant rules or because they were not challenged in the first place. There is thus no need to wait for the outcome of the D.C. Circuit's decision before amending interconnection agreements to reflect these rulings, to the extent that they are not self-effectuating. Indeed, the FCC specifically anticipated that some parties might argue that the new rules contained in the *TRO* should not be implemented until all appellate challenges were exhausted, and it rejected that argument. *See id*. at 17406, ¶ 705.

The *TRO* decisions that remain effective under *USTA II* are of critical importance. Those *TRO* decisions include those where the FCC:

- Determined that the broadband capabilities of hybrid copper-fiber loops and fiber-to-the-home facilities are not subject to unbundling.
- Eliminated the obligation to provide line sharing as a UNE and adopted transitional line-sharing rules.
- Eliminated unbundling requirements for OCn loops, OCn transport, entrance facilities, enterprise switching, and packet switching.

- Eliminated unbundling requirements for signaling networks and virtually all call-related databases, except when provisioned in conjunction with unbundled switching.
- Required ILECs to make routine network modifications to unbundled transmission facilities.
- Eliminated unbundled access to the feeder portion of the loop on a stand-alone basis.
- Required ILECs to offer unbundled access to the network interface device (NID) on a stand-alone basis.
- Found that the pricing and UNE combination rules in § 251 do not apply to portions of an incumbent's network that must be unbundled solely pursuant to § 271.

Interconnection agreements should promptly be amended to reflect the *TRO* rulings that remain effective under *USTA II*. The fact that some other aspects of the *TRO* were vacated or remanded (*e.g.*, those concerning mass-market switching and high-capacity facilities) is no reason to dismiss this arbitration.[13] Verizon's proposed Amendment accommodates any further legal developments, including those that may result from the D.C. Circuit's decision and possible subsequent appellate and FCC actions. Thus, there is no need to delay this proceeding as to any aspect of Verizon's proposed Amendment.

ICG's effort to delay the implementation of the requirements of the *TRO* is directly contrary to the FCC's explicit determination that the new unbundling requirements – and particularly the newly enacted *limitations* on unbundling – must be implemented promptly. The FCC held "that delay in the implementation of the new rules

[13] Verizon has not, as ICG claims, acted inconsistently in requesting that state commissions cease their *Triennial Review Order* impairment proceedings, given that the D.C. Circuit struck down the basis for holding those proceedings. *See USTA II*, 359 F.3d at 568-69 (vacating the *TRO* rules that "delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements"). Verizon's present Petition, as already explained, rests primarily on those portions of the *Triennial Review Order* that were upheld, including portions, such as the routine network modification requirements, that are favorable to CLECs.

we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry." *TRO*, 18 FCC Rcd at 17405, ¶ 703. No party challenged the FCC's determinations in this regard on review. Accordingly, the proceeding that Verizon has initiated is of critical importance to the realization of the 1996 Act's pro-competitive purposes. Given this Commission's strong endorsement of those pro-competitive goals, this proceeding should be of the highest priority.

Although ICG refers to an order of the North Carolina Utilities Commission (NCUC) holding in abeyance the proceeding that Verizon initiated in that state, and to the Maryland PSC letter rejecting Verizon's proceeding in that state, the determinations of those two state commissions do not support the motions to dismiss. First, ICG fails to acknowledge that, in approximately twenty other states, proceedings to amend existing interconnection agreements are underway and have not been dismissed. Second, both the NCUC and the Maryland PSC acted as they did in large measure because they erroneously concluded that the D.C. Circuit's decision in *USTA II*, which vacated the *TRO* in part, warranted at least a delay in acting on Verizon's petition. As discussed above, however, the fact that certain aspects of the *TRO* (in particular, that state commissions would make impairment determinations) have been vacated provides no basis to postpone the task of amending interconnection agreements to reflect the *TRO*'s limitations on unbundling, which were upheld essentially in their entirety in *USTA II*. To be clear, through this Amendment, Verizon seeks to memorialize the portions of the *TRO* that were *upheld* by the D.C. Circuit and to adequately care for those portions of the TRO that were vacated. Verizon is therefore seeking reconsideration of the Maryland PSC's decision and asking to lift the NCUC's

stay.

V. THE COMMISSION SHOULD NOT DISMISS THE PETITION AS TO ROUTINE NETWORK MODIFICATIONS

As an alternative to dismissing Verizon's entire Petition, ICG argues that the Commission should dismiss the Petition insofar as it relates to routine network modifications. ICG Motion at 15–16. It claims that the *TRO* "did not establish new law," but rather "clarified that Verizon's refusal to perform such modifications violated existing law." *Id.* at 15 (citing *TRO*, 18 FCC Rcd at 17377, ¶ 639 n.1940). Thus, argues ICG, no change to the interconnection agreement is necessary.

ICG's interpretation of the *TRO* is incorrect. The FCC explicitly recognized that, by adopting a rule as to routine network modifications, it was at long last "resolv[ing] a controversial competitive issue that has arisen repeatedly, in both this proceeding and in the context of several section 271 applications." 18 FCC Rcd at 17372, ¶ 632. Indeed, the FCC explicitly referred to "[t]he routine modification requirement *that we adopt today*." *Id*. (emphasis added). ICG fails to explain how a requirement that the FCC "adopt[ed] today" – that is, in the *Triennia Review Order* – was preexisting. Thus, the requirement to provide routine network modifications was, in the FCC's own words, a new obligation.[14] Moreover, the FCC had previously approved of Verizon's policy regarding the type of provisioning activities that it would undertake to make UNEs available as consistent with the requirements of section 251(c)(3). *See Virginia 271*

[14] Verizon, of course, was previously required to remove bridge taps and load coils from loops, and some interconnection agreements already contain the terms, conditions, and rates upon which Verizon is required to perform these limited activities. The *TRO*, however, significantly expanded the list of activities that Verizon is required to perform, so as to include certain installation activities, modifications to interoffice transport facilities, modifications to dark fiber facilities, and other activities.

Order,[15] 17 FCC Rcd at 21959, ¶ 141, 21960, ¶ 144; *New Hampshire/Delaware 271 Order*,[16] 17 FCC Rcd 18724-26, ¶¶ 112-114; *New Jersey 271 Order*,[17] 17 FCC Rcd 12349-50, ¶ 151. ICG cannot argue that Verizon is required to undertake *additional* provisioning activities in response to the *TRO* while simultaneously arguing that Verizon's legal obligations are unchanged.[18]

VI. THERE IS NO GOOD REASON TO DISMISS VERIZON'S UPDATE TO ITS PETITION

AT&T does not oppose going forward with this consolidated arbitration of an Interconnection Agreement amendment to memorialize the changes in the unbundling rules flowing from the *TRO* – an arbitration required by the FCC in the absence of a negotiated amendment, to the extent changes in unbundling obligations are not self-effectuating. With this motion to dismiss or strike, AT&T inexplicably seeks to eliminate from the record only Verizon's March 19, 2004 update to its arbitration petition, in which Verizon provided a slightly revised version of its draft *TRO* Amendment to propose some language reflecting the impact of the D.C. Circuit's decision reviewing the *TRO* in *USTA II*.

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[15] Memorandum Opinion and Order, *Application by Verizon Virginia Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Virginia*, 17 FCC Rcd 21880 (2002) ("*Virginia 271 Order*").

[16] Memorandum Opinion and Order, *Application by Verizon New England Inc., et al., for Authorization To Provide in-Region, InterLATA Services in New Hampshire and Delaware*, 17 FCC Rcd 18660 (2002) ("*New Hampshire/Delaware 271 Order*").

[17] Memorandum Opinion and Order, *Application by Verizon New Jersey Inc., at al., for Authorization To Provide In-Region, InterLATA Services in New Jersey*, 17 FCC Rcd 12275 (2002) ("*New Jersey 271 Order*").

[18] ICG also suggests that Verizon's Petition "to arbitrate rates and terms associated with routine network modifications is unjustified and should be dismissed" because the Virginia State Corporation Commission has "already rejected Verizon's attempt in the *TRO* Amendment" to impose additional charges for network modifications. *See* ICG Motion at 16. This is not true. The Virginia Commission has not issued any order forbidding Verizon in Virginia to charge for network modifications in the *TRO* Amendment proceedings.

AT&T wants to arbitrate based on the *TRO* alone, pretending that the D.C. Circuit decision was never issued, and then negotiate and arbitrate ***again*** with regard to the D.C. Circuit decision. This proposal makes no sense and would result in nothing but wasted resources, needless delay in the implementation of the FCC's new unbundling rules and a multiplicity of arbitrations before the Commission. Indeed, the few changes Verizon proposed to its original draft amendment do not harm, and mostly benefit, CLECs like AT&T. Thus, AT&T's motion can have no reasonable basis other than to delay, complicate and confuse this arbitration proceeding.

The premise of AT&T's motion, moreover -- that "USTA II has not yet taken effect" and therefore should not be acknowledged in this arbitration -- is not accurate. AT&T Motion at 1. The D.C. Circuit's stay, which now expires June 15, 2004,[19] applies ***only*** to portions of the *TRO* that the court vacated, such as unbundling of mass-market switching and dedicated transport.[20] The D.C. Circuit's holdings ***affirming*** the FCC on many other issues that are also relevant to this arbitration were not subject to the stay, and the FCC's new unbundling regulations on these issues remain in effect (for example, enterprise switching, line sharing and broadband unbundling, among others). Similarly, AT&T urges this Commission to ignore the D.C. Circuit because the FCC "might" petition the U.S. Supreme Court for review, and that Court "might" accept review, "might" issue a stay pending appeal and "might" reverse the D.C. Circuit, but this is all nothing but wishful speculation on AT&T's part and cannot form the basis for dismissal of Verizon's pleading.

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[19] *United States Telecom Ass'n v. FCC,* No. 00-1012 (Order entered April 13, 2004) (extending stay of mandate through June 15, 2003).

[20] *USTA II*, 359 F.3d at 595 ("As to the portions of the Order that we vacate, we temporarily stay the vacatur (i.e., delay the issue of the mandate)").

A. The Updated Amendment Will Expedite This Proceeding Without Causing Any Harm to CLECs

AT&T's motion makes little sense substantively, and can only be intended as a delay tactic. Where Verizon prevailed before the D.C. Circuit in *USTA II*, the update does not harm AT&T (or any other CLEC) in any way. Indeed, where Verizon lost in the Court of Appeals, the update *helps* AT&T. For example, the update removes the distinction between qualifying and non-qualifying carriers. The update's few other changes to the Amendment include the implementation of the D.C. Circuit's reversal of the FCC's adoption of a route-specific market definition with respect to high-capacity facilities. *See, e.g.*, Update Amendment § 3.1.1.3. But even there, the update is innocuous in that it leaves ample room for the possibility that the *TRO* will not be vacated. That is, the newly revised § 3.1.1.3 enables the Commission (or the FCC) to conduct its granular impairment inquiry on a "route-specific" basis or a "grouping" basis, depending upon which ultimately becomes the law. Given the flexibility of the updated Amendment, the changes proposed by Verizon should be uncontroversial – at least absent a desire by AT&T to make this *TRO*-implementation proceeding as complicated, piecemeal, and lengthy as possible.

The updated Amendment makes sense because its flexible language will eliminate the need to have multiple, follow-up arbitrations after every legal development in this ongoing saga.[21] Under the cumbersome approach favored by AT&T, the Commission would proceed with this arbitration as if *USTA II* was never decided. The

[21] AT&T argues that "[t]his Commission has enough work to do to arbitrate the issues that are in fact ripe for review. It makes little sense to arbitrate issues that have not yet matured and may, in fact, never come to pass." AT&T Motion at 2-3. But the only "issue" is how to draft appropriate language that accommodates the different outcomes that may arise during the course of ongoing litigation. The work that will be required for this simple task is dwarfed by the work that will be required if such language is not included in the Amendment.

Commission would then conduct a second arbitration (potentially commencing before this arbitration is complete), to effectuate contractual changes arising from *USTA II*, and then a ***third*** arbitration following a decision by the Commission or the FCC identifying specific mass market switching and dedicated transport routes or markets that need no longer be unbundled.

Because this scheme is absurd, other state commissions have endorsed as "reasonable" and "understandable" Verizon's efforts to make these *TRO*-implementing arbitrations as efficient as possible through its updated Amendment.[22] State commissions already have the challenging task of arbitrating *TRO* amendment disputes within the timeframe mandated by the FCC, and they are understandably reluctant to accept an invitation to make these proceedings even more complicated. Amendment language that eliminates the need for follow-up arbitrations, such as that proposed by Verizon, will substantially reduce complexity and delay.[23] Given that the parties to this

[22] *See, e.g.*, *Re Petition of Verizon Hawaii, Inc. for Arbitration of an Amendment to Interconnection Agreements*, Docket No. 04-0040, Order No. 20846, at 2 ("It is understandable that Verizon Hawaii is considering possible modifications to its filed arbitration petition due to the filing of the D.C. Circuit Order, and its proposal to file any such modifications by March 19, 2004 appears to be reasonable."). *Petition of Verizon Washington, D.C., Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, TAC-19-14, Order No. 13129, ¶ 5 ("The Commission agrees that the *USTA II* decision may affect some of Verizon DC's proposed interconnection agreement amendments contained in its Petition. The Commission believes that granting Verizon DC until March 19, 2004 to file any amendments to its Petition is reasonable.").

[23] The FCC asserted that "delay in the implementation of the new rules . . . will have an adverse impact on investment and sustainable competition in the telecommunications industry." Report and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17405, ¶ 703 (203) ("*TRO*").

arbitration have had ample notice and opportunity to respond to the updated Amendment,[24] there is no reason why the updated Amendment should be stricken.

Clearly, the Commission cannot render a decision that ignores the dictates of federal law as laid out in *USTA II*. The update to Verizon's petition is the procedural mechanism for raising these issues early in the proceeding, rather than waiting until the briefing or exception stage. If *USTA II* is stayed on further appeal to the United States Supreme Court, as AT&T predicts but Verizon doubts, the Commission's order may reflect that fact, consistent with the amendment's flexible language accommodating this development.

B. The Change-of-Law Provision in AT&T's Interconnection Agreement Is Inapposite

AT&T contends that once the *USTA II* mandate issues, Verizon will be obligated to follow the change-of-law provision in section 9.3 of its interconnection agreement with AT&T. AT&T Motion at 3. In fact, the "change of law" that has occasioned this proceeding is the FCC's issuance of the *TRO* and its resulting new unbundling regulations, and this arbitration proceeding is therefore mandated "even in instances where a change of law provision exists." *TRO* at ¶ 704. Put differently, although *USTA II* may eventually alter the unbundling obligations of the *TRO*, it is still the unbundling obligations of the *TRO*, not some other order or ruling, that are being implemented in this proceeding. The revision to the Amendment merely modifies the language that Verizon is proposing with respect to the change of law created by the *TRO* in light of events after Verizon first proposed its *TRO* Amendment six months ago. No contractual

[24] By Secretarial Letter dated March 18, 2004, the Commission extended the due date for the CLECs' response to Verizon's petition, including the updated Amendment, to April 16, 2004.

provision prohibits a party to a negotiation or arbitration from modifying its original position in this FCC-mandated proceeding to account for subsequent events.

If granted, AT&T's motion would bar Verizon from proposing contract language in this proceeding consistent with *USTA II*, but apparently would leave AT&T free to press its own language interpreting that decision. AT&T has indeed proposed to amend § 6 of the *TRO* Amendment to state that the D.C. Circuit Court has "issued a decision vacating and remanding certain portions and affirming other portions of the TRO but stayed its vacatur and remand." *See* TRO Amendment and Attachment, redlined by AT&T to show its proposed changes, filed as Exhibit 1 to AT&T's Response to Verizon Petition for Arbitration. AT&T also seeks to amend the definitions of Dark Fiber Transport and Dedicated Transport in § 2 of the *TRO* Attachment to include entrance facilities, apparently in light of the D.C. Circuit's remand of that issue to the FCC in *USTA II*. *Id*. Exhibit 1. AT&T cannot justify this blatantly prejudicial double standard, and its motion should be denied.

VII. CONCLUSION

For the foregoing reasons, the Commission should deny the motions to dismiss filed by ICG and AT&T.

Respectfully submitted,

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